OSK Securities Bhd v Probo Pacific Leasing Pte Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–840 OF 2003
MOKHTAR SIDIN, ZALEHA ZAHARI AND HELILIAH JJCA
3 NOVEMBER 2008

Contract — Agreement — Put option agreement — Alteration of term of agreement — Whether defendants and their servants had intentionally or fraudulently tampered with agreement — Whether agreement executed by parties was forgery — Whether there was sufficient evidence of fraud

Contract — Misrepresentation — Fraudulent misrepresentation — Whether second defendant fraudulently induced plaintiff to enter into agreement

On 9 November 1985, the plaintiff and the first defendant, a company incorporated and carrying on business in Singapore, had entered into a put option agreement ('the agreement') over shares. The agreement, which was in effect a form of tripartite arrangement between the plaintiff, the first defendant and the second defendant, a Malaysian businessman and valued client of the plaintiff who had at the material time engaged in share transactions via the plaintiff company, was the source of the dispute between the parties. The agreement was prepared by the first defendant and sent to the second defendant, who forwarded it to the plaintiff. Upon execution the agreement was returned to the first defendant together with a cheque for S$1 as consideration. On 26 October 1988 the first defendant gave the plaintiff written notice that it was exercising its option under the agreement to sell the shares to the plaintiff. At this juncture the plaintiff claimed that the agreement relied upon by the first defendant had been falsified and/or forged. This led to the plaintiff filing its claim for declaratory relief against the first defendant, the second defendant and their servants or agents for having intentionally or fraudulently tampered with the agreement. The plaintiff alleged that the defendants and or their servants or agents had altered the word 'three days' in the agreement to 'three years', after the plaintiff had executed the agreement and that by so doing had intentionally or fraudulently tampered with the said agreement. The plaintiff further claimed that if the agreement was to run for three years then it would cause the plaintiff to suffer loss and damage. In addition, in the event the court found the option in the agreement to run for three years, the plaintiff claimed damages against the second defendant for alleged fraudulent

misrepresentations made by him. The first defendant filed a counterclaim for the sum of RM1,867,788.80 against the plaintiff, for wrongful repudiation of the agreement. The defendants maintained that the agreement was to run for three years but the plaintiff tendered oral evidence that in the negotiations conducted between its representatives and the second defendant the latter had represented to the plaintiff that the option period would be for three days because it was merely intended for purposes of bridging the second defendant's financial obligations. The circumstances of the case indicate that the second defendant required financing in the form of loan transactions and that there was a condition that the second defendant should obtain a put option from a reputable broker in favour of the first defendant and that the agreement constituted a security for the loan granted by the first defendant to the second defendant. At the same time, the plaintiff alleged that the plaintiff only agreed to be a party to the agreement because the second defendant was able to convince the plaintiff that he only required a put option period of three days to bridge his financing. Therefore, the plaintiff's allegation against the second defendant was that after having received the agreement he was the person who caused the first page of the agreement to be altered ie the second defendant had forged and/or tampered with the agreement for his own benefit. The main issues for determination at the trial were whether the option period was three days as alleged by the plaintiff or three years as contended by the defendants and whether the agreement executed by the parties was a forgery and whether the defendants had committed fraud. The trial judge held that the plaintiff had not succeeded in establishing that the first page of the dated agreement containing the option period had been tampered with and that the plaintiff's bare allegations of fraud were unsupported by evidence which could show that the defendants had committed fraud. This was the plaintiff's appeal against that decision.

Held, dismissing the appeal with costs:

(1) The trial judge had considered all aspects of the evidence led by the plaintiff and the defendants. The plaintiff had not been able to establish what representations made by either the first or second defendant, or what conduct of the defendants, constituted fraud or forgery other than suspicions that someone had tampered with the documents (see para 27).

(2) The trial judge had not erred in fact or law in arriving at his determination and therefore there was no need for appellate intervention in this case. As such, the findings of fact could not be disputed and the first defendant had succeeded in its counterclaim against the plaintiff (see para 28).

[Bahasa Malaysia summary

Pada 9 November 1985, plaintif dan defendan pertama, sebuah syarikat yang diperbadankan dan menjalankan perniagaan di Singapura, telah memasuki satu perjanjian opsyen 'call and put' ('perjanjian tersebut') mengenai saham-saham. Perjanjian tersebut, yang merupakan sebahagian daripada perjanjian tiga pihak di antara plaintif, defendan pertama dan defendan kedua, seorang ahli perniagaan Malaysia dan pelanggan yang dihargai plaintif yang telah pada masa matan berurusniaga dalam transaksi-transaksi saham melalui syarikat plaintif, adalah sumber pertelingkahan di antara pihak-pihak tersebut. Perjanjian tersebut disediakan oleh defendan pertama dan diserahkan kepada defendan kedua, yang telah menyerahkannya kepada plaintif. Setelah disempurnakan, perjanjian tersebut telah dikembalikan kepada defendan pertama bersama dengan satu cek S$1 sebagai balasan. Pada 26 Oktober 1988 defendan pertama memberi plaintif notis bertulis bahawa ia sedang melaksanakan opsyennya di bawah perjanjian tersebut untuk menjual saham-saham kepada plaintif. Pada peringkat ini plaintif mendakwa bahawa perjanjian yang disandarkan oleh defendan pertama telah dipalsukan dan/atau ditiru. Ini mendorong plaintif memfailkan tuntutannya untuk relief statutori terhadap defendan pertama, defendan kedua dan pekerja-pekerja atau ejen-ejennya kerana dengan sengaja atau secara fraud mengubah perjanjian tersebut. Plaintif mendakwa bahawa defendan-defendan dan atau pekerja-pekerja atau ejen-ejennya telah mengubah perkataan 'tiga hari' di dalam perjanjian tersebut kepada 'tiga tahun', setelah plaintif menyempurnakan perjanjian tersebut dan dengan berbuat demikian telah dengan sengaja atau secara fraud mengubah perjanjian tersebut. Plaintif seterusnya mendakwa bahawa jika perjanjian tersebut berlanjutan selama tiga tahun maka ia akan menyebabkan plaintif mengalami kehilangan dan kerugian. Selanjutnya, sekiranya mahkamah mendapati opsyen di dalam perjanjian tersebut berlanjutan selama tiga tahun, plaintif menuntut ganti rugi terhadap defendan kedua kerana dakwaan salah nyata fraud yang dibuat olehnya. Defendan pertama memfailkan tuntutan balas untuk wang sejumlah RM1,867,788.80 terhadap plaintif, kerana menamatkan perjanjian tersebut secara salah. Defendan menegaskan bahawa perjanjian tersebut berlanjutan selama tiga tahun tetapi plaintif mengemukakan keterangan lisan bahawa dalam perbincangan yang dilakukan di antara wakilnya dan defendan kedua, defendan kedua telah mengemukakan kepada plaintif bahawa tempoh opsyen adalah untuk tiga hari kerana ia hanyalah bertujuan untuk pembiayaan tanggungjawab kewangan defendan kedua. Keadaan kes ini menunjukkan bahawa defendan kedua memerlukan pembiayaan dalam bentuk transaksi-transaksi pinjaman dan bahawa terdapat syarat bahawa defendan kedua perlu mendapatkan satu opsyen put daripada broker terkemuka dengan berpihak kepada defendan pertama dan bahawa perjanjian tersebut membentuk satu sekuriti untuk pinjaman yang diberikan oleh defendan

pertama kepada defendan kedua. Pada masa yang sama, plaintif mendakwa bahawa plaintif hanya bersetuju menjadi ahli kepada perjanjian tersebut kerana defendan kedua mampu untuk meyakinkan plaintif bahawa dia hanya memerlukan tempoh opsyen 'put' selama tiga hari untuk membiayai kewangannya. Oleh itu, tuduhan plaintif terhadap defendan kedua adalah bahawa setelah menerima perjanjian tersebut dia adalah orang yang menyebabkan mukasurat pertama perjanjian tersebut diubah iaitu defendan kedua telah memalsukan dan/atau mengubah perjanjian tersebut untuk kepentingannya sendiri. Isu-isu utama yang perlu ditentukan semasa perbicaraan adalah sama ada tempoh opsyen adalah tiga hari seperti yang didakwa oleh plaintif atau tiga tahun seperti dihujah oleh defendan dan sama ada perjanjian yang disempurnakan oleh pihak-pihak adalah satu penipuan dan sama ada defendan-defendan telah melakukan fraud. Hakim mahkamah perbicaraan memutuskan bahawa plaintif tidak berjaya dalam memastikan mukasurat pertama perjanjian bertarikh tersebut yang mengandungi tempoh opsyen tersebut telah diubah dan bahawa tuduhan-tuduhan kosong mengenai fraud oleh plaintif tidak disokong oleh bukti yang boleh menunjukkan defendan-defendan melakukan fraud. Ini adalah rayuan plaintif terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim perbicaraan telah mempertimbangkan kesemua aspek keterangan yang dikemukakan oleh plaintif dan defendan-defendan. Plaintif tidak mampu membuktikan apakah representasi-representasi yang dibuat sama ada oleh defendan pertama atau kedua, atau apakah perlakuan defendan-defendan yang merupakan fraud atau pemalsuan selain dari syak bahawa seseorang telah mengubah dokumen-dokumen tersebut (lihat perengan 27).

(2) Hakim perbicaraan tidak terkhilaf dalam fakta atau undang-undang dalam mencapai keputusannya dan oleh itu tidak perlu bagi campur tangan mahkamah rayuan dalam kes ini. Maka, penemuan-penemuan fakta tidak boleh dipertikaikan dan defendan pertama telah berjaya dalam tuntutan balasnya terhadap plaintif (lihat perengan 28)]

Notes

For cases on agreement generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2422–2432.

For cases on fraudulent misrepresentation, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4384–4400.

Cases referred to

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863, HC (refd)

A *Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate Ltd* [1964] MLJ 176, FC (refd)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165, HC (refd)
Tay Kheng Hong v Heap Eng Moh Steamship Co Ltd [1964] MLJ 87, HC (refd)
B *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, PC (refd)
Yeap Leong Huat v Yeap Leong Soon & Anor and another application [1989] 3 MLJ 157, SC (refd)

C

Appeal from: Suit No D1–22–129 of 1989 (High Court, Kuala Lumpur)

N Navaratnam (Conrad Young with him) (Sivanathan) for the appellant.
M Nagarajah (Alvin Tang and Chryshantini Niles with him) (Shook Lin & Bok) for the first respondent.
D *Robert Lazar (Rishwant Singh with him) (Shearn Delamore & Co) for the second respondent.*

Heliliah JCA:

E

[1] This was an appeal that was filed against the decision of the learned High Court judge who had dismissed the appellant's claim for declaratory relief against the first and second respondents and for damages against the second respondent. In addition the first respondent's counterclaim against the F appellant for the sum of S$1,867,788.80 has been allowed with interest at the rate of 8% per annum from the date of filing of the re-amended defence and counterclaim that is 4 June 1998 to the date of full payment and settlement of costs. Hereafter in this appeal the appellant and the two respondents would also be referred as the plaintiff and the first and second defendants G respectively.

[2] The plaintiff has prayed for the following orders:

(a) a declaration that a put option agreement over shares dated 9 November H 1985 entered into between the plaintiff and the first defendant, a company incorporated in Singapore, is a forgery and therefore void ab initio;

(b) for damages against the second defendant, a director of Hove Traders I Pte Ltd, a company incorporated in Singapore and Global Holdings Sdn Bhd, a locally incorporated company, in the event that the court finds that the put option agreement was for a period of three (3) years.

[3] The first defendant has also filed a counterclaim for wrongful repudiation of the aforementioned agreement dated 9 November 1985 (hereinafter referred to the '1985 option agreement'). A

[4] Before dealing with the issues addressed in the appeal the relevant facts leading to the appeal require mention. The 1985 option agreement was then prepared by DW1 of M/s Prakash Gurbani & Chong then the first defendant's solicitors. The documents were then sent to the second defendant's office, who then left the documents at the plaintiff's office with one Steven Wong Cheng Che a director of the appellant. Upon execution of the documents by the plaintiff the documents were collected and dispatched to the first defendant. On 30 November 1985 the 1985 option agreement, a covering letter dated 27 November 1985 and a cheque payment of S$1 were delivered by courier to the plaintiff. The executed agreement was acknowledged receipt by the plaintiff where the letter of 27 November 1985 was not disputed by the plaintiff. Additionally the first defendant's cheque of S$1 paid as consideration was also cleared by the plaintiff. Subsequently on 21 October 1988 the first defendant gave written notice to the plaintiff that it considering exercising its rights under the 1985 option agreement. The plaintiff at that juncture requested from the first defendant a copy of the agreement and on 26 October 1988 a copy of the said agreement was faxed to the appellant. On that same date, that is, 26 October 1988 the first defendant gave its written notice to the plaintiff that it was exercising its option to sell the shares to the appellant under the terms of the 1985 option agreement. This was denied and it was subsequent to this by a letter of 3 December 1989 that the plaintiff through its solicitor stated that the 1985 option agreement being relied upon has 'been falsified and/or forged'. This led to the plaintiff filing its claim. The following are the relevant excerpts from the amended statement of claim. B C D E F G

> 11. Further, it is averred that the 2nd Defendant's representations was made fraudulently, in that the second defendant knew that it was false, or made recklessly, not caring whether it was true or false.
>
> 12. By reason of the 2nd Defendant's fraudulent misrepresentations, the plaintiff will suffer loss and damage in the event that the Honourable Court finds that the put option period is for a period of three [3] years.
>
> 13. *The 1st Defendant and/or the 2nd Defendant and/or a servant or agent of the 1st or 2nd Defendant intentionally or fraudulently tampered with the said incompleted Agreement.*
>
> PARTICULARS OF FRAUD OF THE 1ST DEFENDANT AND/OR THE 2ND DEFENDANT AND/OR A SERVANT OR AGENT OF THE 1ST DEFENDANT OR THE 2ND DEFENDANT

H I

A a. *Intentionally or Fraudulently removing or causing to be removed the first page of the said incompleted Agreement which had the word '... three (3) days...' on the 3rd line of recital B of the said incompleted Agreement, after the Plaintiff had executed the said incompleted Agreement and without the Plaintiff's knowledge, consent and/or authority*.

B b. *Intentionally or Fraudulently replacing or causing to be replaced the 1st page of the said incompleted Agreement with another page which had the word 'three (3) years' instead of 'three (3) days' on it, after the plaintiff had executed the said incompleted Agreement and without the plaintiff's knowledge, consent and/or authority*.

c. *Intentionally or Fraudulently altering and/or amending the word three (3) days in*
C *the said incompleted Agreement to three (3) years, after the plaintiff had executed the said incompleted Agreement and without the Plaintiff's knowledge, consent and/or authority*.

d. *Intentionally or Fraudulently tampering with the said incompleted Agreement which had already been executed by the Plaintiff without the Plaintiff's knowledge, consent*
D *and/or authority.*

[5] The main issue raised in the appeal relates to a specific term in the agreement and the allegations that the defendants had either tampered with
E or forged the 1985 option agreement. There are two parallel documents identified as P1 and D15 respectively described by the parties as the put option agreement.

[6] P1 is the undated 1985 put option agreement while D15 is the dated
F 1985 put option agreement. The terms of both P1 and D15 are identical but there are certain particulars which are missing in P1 the undated 1985 put option agreement. P1 does not contain the date on which the agreement is purported to have been concluded. Additionally P1 does not contain the signature of Probo Pacific Leasing Pte Ltd referred as a 'PPL' or the first
G defendant in this appeal. P1 contains the signature of Wong Chong Che made for and on behalf of Osk & Partners Sdn Bhd referred to as the 'intending purchaser' or the plaintiff in this appeal.

[7] Apposite to P1, D15 indicates that on 9 November 1985 an agreement
H was made between PPL and the intending purchaser. D15 also contained the signatures of both parties and a stamp.

[8] It is this agreement which is the source of dispute between the parties as stated by the learned trial judge in the grounds of judgment as follows:

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> The main issue in these proceedings which needed to be determined by the court was whether the option period was three days as insisted by the plaintiff or three years as contended by the first and second defendants. The other issues which needed to be determined was whether the executed put option agreement was a forgery and whether the defendants had committed fraud.

[9] Ostensibly the 1985 option agreement which gave an option of three years was one where both parties had their attested signature and consideration was also stated. However the plaintiff in this appeal is claiming that agreement is vitated by fraud.

[10] At the outset it is noted that the learned trial judge in his grounds of judgment has displayed that he has considered the opposing evidence before arriving at a determination that on a balance of probabilities the plaintiff has not succeeded in establishing that the first page of the document D15 has been tampered and that the original copy of the agreement is as found in document P1.

[11] The plaintiff has alleged misrepresentation in addition to fraud. The learned trial judge in making a finding has in our view perused in detail the evidence adduced both by the plaintiff and the defendants. Throughout the written grounds of judgment it is noted that the learned trial judge had sieved through the evidence led by the witnesses for the plaintiff and the defendants. It has been elaborated in the grounds of judgment that the burden was therefore on the plaintiff to show that what has been executed was a put option agreement for three days and that both the first and second defendants had tampered either intentionally or fraudulently with the incomplete put option agreement or fraudulently altered or amended the first page of the agreement to show that the put option period was for three years or by replacing the first page of the agreement with a new page whereby the option period became three years.

[12] The 1985 option agreement was the outcome of discussions between PW1 a witness for the plaintiff and the second defendant (DW3) a client of the plaintiff. The oral evidence of PW1 and PW3 were to the effect that what had been negotiated was a three day put option. Nevertheless the very document relied upon by the plaintiff appeared to be one sided in that there was an undated document with no completed signatures for both parties. The evidence of the plaintiff did not furnish an explanation as to why the document was not signed by both parties. It was the contention of the plaintiff that as the result of representation made by the second defendant the put option agreement was intended to be an instrument to enable the second defendant's company to secure a credit facility from the first defendant. PW1 who had signed the agreement maintained that the photocopy of the put option agreement which was undated represented copies of the put option agreement which were returned to the second defendant.

[13] It is found that the learned trial judge has accepted the evidence of the defence witnesses in refusing the oral evidence of the plaintiff witnesses PW1 and PW3 that in the negotiations conducted between PW1 and DW3 it was

A the latter who had represented to PW1 that the option period would be for three days because it was merely intended for purposes of bridging the second defendant's financial obligations. It was the second defendant who approached PW1 to request the plaintiff whereby the said agreement was discussed between the second defendant and PW1. It was the averment of the B plaintiff that a put option of three years did not commensurate with the granting of a fee of RM15,000 as a put option for a period of three years would have been structured differently in the form of a six month rollover account. The circumstances of the case indicate that there was required by the second defendant financing in the form of loans transactions to which it was C there was a condition that the second defendant should obtain a put option from a reputable broker in favour of the first defendant. The 1985 option agreement constituted a security for the loan granted by the first defendant to the second defendant. According to the plaintiff the 1985 option agreement was the outcome of the second defendant being able to convince D PW1 that he only required a put option period of three days to bridge his financing. But the allegation against the second defendant was that after having received the signed agreement he was the person who caused the first page to be altered that is the second defendant has forged/and or tampered with the agreement for his own benefit. *Boonsom Boonyanit v Adorna E Properties Sdn Bhd* [1995] 2 MLJ 863.

[14] The first defendant however relied on the contemporaneous documents that led to the existence or the need of having a put option F agreement which in all circumstances would be more consistent with a three year period of option. There was here a form of tripartite arrangement whereby the first defendant is a company incorporated and carrying on business in Singapore. The second defendant a Malaysian businessman and valued client of the plaintiff had at the material time engaged in share G transactions via the plaintiff company. Being the director of Hove Traders Pte Ltd and Global Holdings Sdn Bhd, Hove had applied for a loan of S$3m from the first defendant for a term of two years. It is the defendants' case that the disputed put option was not drafted in isolation. The put option constituted one of a series of transactions supporting the loan facility between H Hove and the first defendant. The defendants relied on the circumstances prior to and at the time of the execution of the put option. The defendants' witness DW1 is the solicitor who prepared the agreement and who maintained that it was for a period of three years. There were three other put I option agreements concluded between the first defendant and the second defendant, the first defendant and Global and between first defendant and Tan Kim Yeow. In all three the option period was also for three years. The defendant therefore relied on judicial statements made in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 namely that:

It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously all the documents must be read together as if they are one.

[15] All those documents were prepared by one firm that of DW1.

[16] Estoppel was also relied as a defence by the first defendant in that the conduct of the plaintiff was such that there had not been an outright manifestation that the period of the put option was not three years. Even the police report which was lodged was made to support alleged fraud was made after the filing of the action. Evidence was also given that the plaintiff did receive and had banked an amount of S$1 (the consideration for the 1985 option agreement). The plaintiff had also been paid RM15,000 by the second defendant as a fee for signing the 1985 option agreement.

[17] The plaintiff professed to have been made aware of the difference in period only when it received a letter dated 21 October 1988 when the first defendant declared its intention to exercise their rights under the put option.

[18] It is part of the contention of the plaintiff that the changes in the duration of the put option period is evidenced by perforation marks which suggest that the documents have been stapled and restapled. The allegation of fraud and/or forgery according to the plaintiff points towards the second defendant. In respect of this allegation the learned trial judge has accepted the law as applied in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 in the proposition that fraud means actual fraud and not constructive or equitable fraud. The allegations of representation and forgery were clearly not accepted by the learned judge.

[19] On the contrary favorable acceptance was made of the submission that overall terms of the agreement were in consonance with a three year put option period C1 1.2, 2.1 of Eks D15.

[20] It would also appear that the evidence of DW1 indicated that the handling of the documents were all prepared by the firm of Prakash Gurbani & Chong. Against the background of contemporaneous documents it was also determined that the conduct of the plaintiff in the acceptance and encashment of cheques constitute estoppel by conduct.

[21] In view of two sets of evidence adduced by the litigant it becomes incumbent upon this court to deal with specific parts of the judgment of the trial court in making certain findings firstly on the allegations of misrepresentation and secondly on the issue of fraud.

[22] After having perused cll 1.2 and 21 the learned trial judge stated:

> I would agree with the contention of counsel for the first defendant that the above-said clauses envisaged terms suited to a longer option period and were therefore inconsistent with the plaintiff's claim that the option period was for three days from the date of the execution of the put option agreement. If the put option agreement was indeed for three days, as averred by the plaintiff, the option period would have expired even before the execution and stamping of the put option agreement could take place. Under the circumstances, the claim by the plaintiff that they were induced into entering the put option agreement as a result of the representation made by the second defendant, namely, that the option period would be three days from the date of the execution of the agreement, cannot stand. A representation is a statement of fact. the second defendant denied having ever made such a representation to the plaintiff. According to *Chesire, Fifoot and Furmston's Law of Contract*, Singapore and Malaysian Ed (at p 407) a representation is:
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> > ... a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract.
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> The plaintiff insisted that the second defendant did made a representation that the option period was for three days. I had the advantage of observing the second defendant when he gave evidence from the witness-box but then I am also aware that it is always unsafe to rely on the demeanour of a witness who is also a defendant in cases of this nature where there is an abundance of contemporaneous documentary evidence. I would tend to agree with the submission of counsel for the first defendant and also that of the second defendant that the testimony of the second defendant should be tested against the documentary evidence, particularly documents that are contemporaneous with the transaction.

[23] Further on the following finding was made:

> I would also agree with the contention of counsel for the first defendant that they had raised sufficient evidence at the trial through DW1 and the managing director of the first defendant (DW2) to prove that the option period would naturally have been for a longer period than the loan agreement. If a borrower defaulted in repayment in case of expiry of the loan, the first defendant would have the put option agreement as part of an overall security for such a loan and if need be, the first defendant will be able to enforce the security. If the put option agreement ended on the same period or before the loan agreement, the first defendant would be at risk of not being able to exercise their right under the put option agreement. Therefore the plaintiff's allegation that the parties intended and had entered into an agreement for a period of three days appears to be far from credible when the loan agreement was in fact for a two year period. In agreeing with the above submissions of the first and second defendants, I had in the forefront of my mind the general principles of construing a contract. In *The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said (at pp 997–998):

In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen) Ltd* [1984] 1 All ER 555 where it is said at p 560:

> The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[24] With regard to the allegation of fraud the following observation was made:

> The other charge against the first and second defendants was that they have committed fraud. Fraud simply means dishonesty and the law is that a charge of fraud, whether made in civil or criminal proceedings, must be proved beyond reasonable doubt and cannot be based on conjecture (*Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93). In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 Raja Azlan Shah CJ (Malaya) (as he then was) said (at p 138):
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> > Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie, dishonesty of some sort' for which the registered proprietor is a party of privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate'; but 'fraud ... implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled' (per Romily MR in *Green v Nixon*). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'

A On the facts of the case, I cannot see any evidence which could show that the first and second defendants had committed fraud. I would agree with the submissions of both counsel for the first and second defendant the plaintiff had only made bare allegations of fraud, unsupported by any evidence given at the trial. In his submission, counsel for the first defendant argued that there was not a shred of
B evidence to prove the existence of fraud and that the first defendant was privy to any such fraud. He contended that despite raising the issue of fraud, the plaintiff had failed to discharge the burden of proof on a balance of probabilities on that plea based on the particulars of fraud pleaded and evidence given at the trial. Thus the charge by the plaintiff that the first defendant had made fraudulent representations to the plaintiff cannot stand at all. This, he pointed out, was
C supported by a letter dated 5 September 1989 (exh P9) wherein the plaintiff, by their solicitors, had admitted that the 'Prior to the 28th October 1988 the Plaintiff was not aware of the existence of the 1st defendant nor have they had any correspondence, dealings or any communication whatsoever with the first defendant'. That letter further stated the following:

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> (there is an error to paragraph 6 of the Statement of Claim. The representations were made by the second defendant and not by the first defendant as stated).

Counsel stressed that the plaintiff had not specifically denied the first defendant's averment in para 5 of their statement of defence which clearly set out that the
E second defendant was never at any time acting on behalf of the first defendant. the first defendant had led evidence at the trial to prove that the second defendant was neither an agent of the first defendant nor was he authorised to represent the first defendant to negotiate on behalf of the first defendant as regards the put option agreement. the second defendant made the arrangements for the plaintiff to enter
F into the put option agreement with the first defendant in order to obtain financing, and in return, it was the second defendant who subsequent to negotiations paid the RM15,000 to the plaintiff as fee for signing the put option agreement. Therefore, knowledge of any representation made by the second defendant as alleged by the plaintiff cannot be attributed to the first defendant. the first defendant cannot be said to have fraudulently induced the plaintiff to enter into the put option
G agreement as the first defendant had in fact neither made any representations nor come into contact at all with the plaintiff at that material time.

On the whole, I would agree with the submission of both counsel for the defendants that the plaintiff had failed to prove forgery and/or fraud against the first and second defendants even on a balance of probabilities. What is clear, to me,
H is that there is nothing to show that the first defendant was guilty of any wrongdoing of any nature with regard to the put option agreement. The plaintiff's allegations against the first defendant are without basis. Since the plaintiff had failed to establish the charge of forgery and/or fraud against the second defendant, the executed put option agreement stands and consequently the first defendant
I would be entitled to exercise their right under the same.

[25] In *Yeap Leong Huat v Yeap Leong Soon & Anor and another application* [1989] 3 MLJ 157 the Federal Court has stated, inter alia, that an appellate court can review a trial court's decision if the reasons are unsatisfactory or if

in reaching its conclusion the learned judge has not properly analysed the entirely of the evidence which was given before him. The question here also is whether there has been failure to give due regard to some evidence. The response here is found in the case of *Lam Soon Oil & Soap Manufacturing Ltd v Impex Syndicate Ltd* [1964] MLJ 176 where Wee Chong Jin CJ referred to a Privy Council decision on a statement of the principles upon which an appellate court should act in reviewing the decision of a judge of first instance in *Tay Kheng Hong v Heap Eng Moh Steamship Co Ltd* [1964] MLJ 87 where it is said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt* or *Thomas v Thomas*: 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court'. Later His Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd*: 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'. Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

[26] This is indeed a case where it cannot be said that the learned trial judge has omitted to consider aspects of the evidence led by the plaintiff or the first and second defendants.

[27] In its totality counsel for the first defendant has submitted that the appellant's case is such there is no room for us not to defer to the judgment of the trial judge. We find it difficult not to uphold this contention. The plaintiff has not been able to establish what were the representations that have

emanated from either the first and second defendant as well as conduct that constitutes fraud or forgery other than suspicions that someone has somehow tampered with the documents.

[28] In finding that the conduct of the plaintiff had established acceptance of D15 we found it difficult to dispute the finding of facts. We do not find here that the trial judge has erred in facts or law in arriving at his determination and henceforth to warrant appellate intervention. Consequently we do also not find it necessary to dwell on the finding that the first defendant has succeeded in its counterclaim against the plaintiff. Accordingly by a majority decision the appeal is dismissed with costs. The decision of the High Court is affirmed. Deposit is for the defendants towards account of taxed costs.

Appeal dismissed with costs.

Reported by K Nesan